

ESTATE OF IRENA (IRENE) CROWNECK HAWK

(Deceased Cheyenne Unallotted)

IBIA 74-7

Decided July 10, 1974

Appeal from an Administrative Law Judge's order denying petition for rehearing.

Affirmed.

Indian Probate: Rehearing: Generally

A request for a rehearing that submits no new evidence and alleges no additional grounds for reconsideration than was presented at an earlier appeal for a rehearing, will be denied.

Indian Probate: Rehearing: Generally

A petition for rehearing based on evidence which fails effectively to controvert the basis for the initial decision in the matter, will be rejected.

Indian Probate: Appeal: Administrative Law Judge as Trier of Facts

When the views of witnesses are conflicting, the findings of the Administrative Law Judge, as the Trier of Facts and as one who had the opportunity to observe the witnesses, shall be given great weight.

APPEARANCES: C. C. Arney, attorney for appellant, Lena Abbie Big Bear Yellow Eagle; John W. Donley, attorney for David Fan Man, Sr., Bill Junior Red Bird, Wilma Red Bird Dyer, Joseph (Joe) Red Bird, Irene Red Bird Yellow Hawk Goodbear, appellees.

OPINION BY ADMINISTRATIVE JUDGE WILSON

Lena Abbie Yellow Eagle, hereinafter referred to as appellant, through her attorney, C. C. Arney, has filed with this Board an appeal from an Administrative Law Judge's denial of her petition for rehearing.

According to the record Irena (Irene) Crowneck Hawk, hereinafter referred to as the testatrix, died testate January 9, 1972. Hearings were held on July 17, 1972, and November 1, 1972, for the purpose of ascertaining her heirs at law, considering claims against her estate and probating her last wills and testaments, dated October 22, 1971, and June 10, 1957.

Thereafter, on January 19, 1973, Administrative Law Judge John F. Curran issued and entered an order, where among other things, the testatrix's last will and testament of October 22, 1971, was disapproved and her last will and testament, dated June 10, 1957, approved.

The appellant, the sole devisee and beneficiary under the disapproved last will and testament of October 22, 1971, filed a petition for rehearing in the matter under date of March 13, 1973, alleging in support thereof the following reasons:

1. Upon newly discovered evidence, as set forth by the attached Affidavits, marked EXHIBITS "A" and "B," and the reason said new evidence was not presented at the prior hearings was because the witnesses were not available at that time.

2. The testimony of Dr. John Huser, upon which the Hearing Examiner placed such great importance, is not complete in that on page 82 of the transcript of the hearing held on November 1, 1972, the Doctor testified that the decedent was suffering from senility due to arteriosclerotic condition; and on page 84 of the transcript the Doctor testified that none of the medications prescribed by him were for arteriosclerosis and that he may not have given her any.

The Judge on May 8, 1973, denied the petition for rehearing for the following reasons:

1. Attached to the petition are affidavits of Medicine Woman Big Nose and Lillie Armstrong who

state that they visited with the decedent in August and September of 1971 and that she was mentally competent. The testimony of these persons on a rehearing would be merely cumulative testimony. Erma Gean Tsotaddle and Sarah Heap of Birds both testified at the hearing on November 1, 1972, that the decedent was competent during that period of time. (Tr. 42, 43, 48, 49) It is a general rule of law that a new trial or rehearing will not be granted on grounds of newly discovered evidence if such evidence is only cumulative in nature. (See Green v. Bums, 204 Okla. 415, 230 P 2nd 892, 1951)

2. The transcript is complete and accurate as to the testimony of Dr. John Huser. (Tr. 80-85) Dr. Huser testified that the decedent had a "generalized arteriosclerotic" condition. (Tr. 81) In answer to a question as to whether he prescribed medication for arteriosclerosis, Dr. Ruser testified that, "No, so I may not have given her any, I didn't check the record that closely". (Tr. 84) The testimony of Dr. John Huser is clear, cogent and consistent as to the mental condition of the decedent.

It is from the foregoing denial that the appeal herein has been taken. The appellant, in support of her appeal, in essence alleges (1) that testatrix had the requisite mental capacity to execute the last will and testament dated October 22, 1971, and (2) that the last will and testament, dated June 10, 1957, as approved, was not properly witnessed and attested to.

The evidence, regarding above Item (1), is disputed and conflicting according to the record.

In situations where testimony presented by opposing parties is conflicting and highly disputed, the decision of the Judge, as the

trier of the facts, should be given great weight for the reason that he had the opportunity to observe the witnesses and to evaluate their testimony directly. Estate of Sam Pierre Alexander, IA-918 (December 9, 1960 and February 7, 1961).

The appellant's contention set forth in above Item (2) we note was considered and disposed of by the Judge in his Order Approving Will and Decreeing Distribution, dated January 19, 1973, copy whereof is attached hereto as Appendix "A" and made a part hereof, and we see no reason to reconsider it herein.

Having reviewed and considered the record, the Board finds that the appellant has shown no compelling reason why the findings set forth in the Administrative Law Judge's Order Denying Petition For Rehearing of May 8, 1973, copy whereof is attached hereto as Appendix "B" and made a part hereof, should not be affirmed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order of the Administrative Law Judge, dated May 8, 1973, be and the same is hereby AFFIRMED and the appeal herein is DISMISSED.

This decision is final for the Department.

Alexander H. Wilson
Administrative Judge

I concur:

Mitchell J. Sabagh
Administrative Judge

Attachments

attorney in Weatherford, Oklahoma, and the evidence shows that the will was executed in the manner required by law.

(B) There was conflicting evidence as to the testamentary capacity of the decedent at the time of the execution of the said will. Lola Little Bird, the owner and operator of a nursing home, testified that the decedent was a patient in the nursing home during the period from November of 1970 until July of 1971. She testified that the decedent did not know what property she owned and was very difficult to communicate with because she spoke primarily in the Indian language. She also testified as to the conduct of the decedent which would indicate her incompetency (Tr. 55, 56, 57).

(C) Alma N. Johnson, the Director of Nurses at the Methodist Nursing Home, Clinton, Oklahoma, testified that the decedent was admitted to the nursing home on December 1, 1971; discharged on December 16, 1971, readmitted on January 7, 1972, and died on January 9, 1972 (Tr. 61). She testified as to the conduct of the decedent which would indicate incompetency and she further testified that the decedent "didn't seem to know and understand what was going on" (Tr. 62).

(D) Dr. John M. Huser, Jr. testified that the decedent was his patient while she was in the nursing home. He testified that the decedent "had a moderately severe senility * * * she was not in contact with reality * * * she was disorientated much of the time, talked irrationally" (Tr. 82). He further testified that she was not capable of recognizing her relatives and did not know what property she owned. Dr. Huser testified that her condition would not improve but would gradually "get worse" (Tr.83).

(E) The testimony of Dr. Huser as to the mental condition of the decedent must be given substantial weight. (See American National Red Cross v. Gumberts, 207 Okl 96, 247 P 2d 735, 739) All the medical evidence supported the contention that the decedent did not possess the testamentary capacity to make the will dated October 22, 1971, and said will should be disapproved. (See Williams v. Bennight, Vol. 43 OBJ 2861, October 24, 1972)

8. (A) a prior will dated June 10, 1957, was submitted for probate. Under the terms of this will, the decedent devised a certain allotment to Wilma Red Bird, but the devise is ineffective for the reason that she did not own the allotment at the time of her death. The decedent made specific devises to Irene Red Bird

Yellow Hawk, Bill Junior Red Bird, David Fan Man and the rest and residue of her estate she devised to Joe Red Bird.

(B) Rosa White Thunder, a witness to said will, testified that she was present with the decedent when she discussed the preparation of the will with James M. Hays, Jr., the scrivener who is now deceased. She further testified that the decedent requested her to witness the will and she identified her signature, and she testified that the decedent signed the will in her presence (Tr. 74). It is noted that attached to the will was a certificate showing that Rosa White Thunder acted as interpreter for the decedent in connection with the preparation of the will. In this connection, one witness testified that the decedent could not speak English (Tr. 48).

(C) Leo Dericksweiler identified his signature as one of the attesting witnesses, but he did not have any recollection concerning the execution of the will (Tr. 69).

(D) Attached to the will dated June 10, 1957, are affidavits of the decedent, the attesting witnesses and the scrivener concerning the execution of the will. This is a "self proved" will. The fact that the evidence failed to establish that the two attesting witnesses did not sign the will in the presence of each other does not invalidate the will. 43 CFR 4.260(a) only requires that the will be "attested by two disinterested adult witness". A failure on the part of the decedent to request specifically that one act as a witness to her will does not constitute lack of due execution. (See Estate of Annie Devereaux Howard, IA-884, December 17, 1959). The will dated June 10, 1957, should be approved.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 2 of the Act of June 25, 1910 (25 U.S.C. 373), and other applicable statutes, and pursuant to 43 CFR 4, IT IS ORDERED that the last will and testament dated October 22, 1971, be and the same is hereby, disapproved, and IT IS FURTHER ORDERED that the will dated June 10, 1957, be and the same is hereby approved.

IT IS ORDERED that the Superintendent will cause to be made a distribution of the trust or restricted estate of the decedent in accordance with said will dated June 10, 1957, subject to payment of the probate fee and allowed claim as follows:

To Irene Red Bird Yellow Hawk Goodbear, Cheyenne Unallottee and devisee, the following:

An undivided 1/2 interest in the allotment of Holy Woman Cheyenne #2054, described as the NW/4 Sec. 25-17N-13 W., I. M., in Oklahoma, containing 160 acres.

To David Fan Man, Sr., Cheyenne Unallottee and devisee, the following:

All of the allotment of Crow Neck, Cheyenne #2166, described as the SE/4 Sec. 34-19N-13 W., I. M., in Oklahoma, containing 160 acres.

To Bill Junior Red Bird, Cheyenne Unallottee and devisee, the following:

An undivided 1/2 interest in the allotment of Hawk, Cheyenne #2053, described as Lots 1, 2, 3, 4, 5 and SW/4 NE/4 Sec. 25-17N-13 W., I. M., in Oklahoma, containing 139.48 acres more or less.

To Joe Red Bird, Cheyenne Unallottee and residuary beneficiary, all of the trust or restricted property listed in the inventory of the Concho Agency dated February 28, 1972, except Cheyenne Allotments 2053, 2054 and 2166, and all other trust or restricted property of the decedent not otherwise disposed of under the terms of said will, if any there be.

IT IS FURTHER ORDERED that distribution of the estate to the devisees be stayed pending a ruling on the application of Donley & McMillin, Attorneys at Law, 113 N. Broadway, Weatherford, Oklahoma, for allowance of attorney fees, except for the payment of a claim hereinafter set forth.

The claim of Irvin Nicholson, Rockcliff Memorial, 638 North Sixth Street, Clinton, Oklahoma 73601, in the amount of \$375.95, covering the purchase of a grave marker, is hereby allowed and is to be paid from funds now held or accruing to the credit of the estate, subject to payment of the probate fee.

The trust or restricted estate of the decedent having been appraised at \$75,650.70, a probate fee of \$75.00 will be collected by the Superintendent or other officer in charge in accordance with the authority found in the Act of January 24, 1923 (25 U.S.C. 377).

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Done at the City of Tulsa, Oklahoma, and dated January 19, 1973.

John F. Curran
Administrative Law Judge

On March 15, 1973, Lena Abbie (Abie) Big Bear Yellow Eagle, an interested party, being the beneficiary under a purported will dated October 22, 1971, filed a petition for rehearing of the Order Approving Will and Decreeing Distribution dated January 19, 1973.

1. Newly discovered evidence; and
2. That the testimony of Dr. John Huser is not complete and is inconsistent in that he testified that the decedent had an arteriosclerotic condition, but did not prescribe medication for that condition.

1. Attached to the petition are affidavits of Medicine Woman Big Nose and Lillie Armstrong who state that they visited with the decedent in August and September of 1971 and that she was mentally competent. The testimony of these persons on a rehearing would be merely cumulative testimony. Erma Gean Tsotaddle and Sarah Heap of Birds both testified at the hearing on November 1, 1972, that the decedent was competent during that period of time. (Tr. 42, 43, 48, 49) It is a general rule of law that a new trial or rehearing will not be granted on grounds of newly discovered evidence if such evidence is only cumulative in nature. (See Green v. Burns, 204 Okla. 415, 230 P 2nd 892, 1951)
2. The transcript is complete and accurate as to the testimony of Dr. John Huser. (Tr. 80 - 85) Dr. Huser testified that the decedent had a "generalized arteriosclerotic" condition. (Tr. 81) In answer to a question as to whether he prescribed medication for arteriosclerosis, Dr. Huser testified that, "No, so I may not have given her any, I didn't check the record that closely". (Tr. 84) The testimony of Dr. John Huser is clear, cogent

and consistent as to the mental condition of the decedent.

Esther Waters (Black Wolf) also filed a petition for rehearing alleging that she was an heir at law and objecting to the will of the decedent for the reason that "she always writes her own name". The petition shows that she is a second cousin of the decedent. In the Order in this cast, it is determined that Nettie Black Tyler Starr, an aunt of the decedent, is the sole and only heir at law. Under Subsection 6, Section 213, Title 84, Oklahoma Statutes, 1971, Mrs. Starr is the next of kin and the sole heir of the decedent. (See In Re Humphrey's Estate, 141 P 2nd 993, Okl. 1943)

As to the objection to the will, the decedent signed her name to the June 10, 1957 will which was approved. The petition of Esther Waters (Black Wolf) should be denied.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by the Act of June 25, 1910, as amended by the Act of February 14, 1913 (25 U.S.C. 372, 373), and other applicable statutes, and pursuant to 43 CFR 4.241(b), IT IS ORDERED that the separate petitions for rehearing of Lena Abbie (Abie) Big Bear Yellow Eagle and Esther Waters (Black Wolf) be and the same are hereby denied.

Done at Tulsa, Oklahoma, this 8th day of May, 1973.

John F. Curran
Administrative Law Judge